Supreme Court, U.S.
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No. 94-156

In The

Supreme Court of the United States

October Term, 1994

NICHOLAS A. DIGIRLAMO,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent,

--and--

CHARLES M. CARBERRY, ESQ.,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Second Circuit

REPLY BRIEF OF PETITIONER

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TABLE OF CONTENTS

Page

I IMPORTANCE OF THE QUESTION PRESENTED 1

II RELEVANT LANGUAGE OF UNION CONSTITUTION IS VAGUE 5

III RELIANCE ON UNCORROBORATED STATEMENT OF A CONFIDENTIAL INFORMANT DENIED A FAIR HEARING 7

TABLE OF AUTHORITIES

Brock v. Roadway Express, Inc., 481 U.S. 252 (1987) ...3, 9

U.S. v. IBT, 853 F.Supp. 757 (S.D.N.Y. 1994) 2

U.S. v. IBT, 803 F.Supp. 761 (S.D.N.Y. 1992) 1

49 USC Appendix § 2305 3

REPLY BRIEF OF PETITIONER

I

IMPORTANCE OF THE QUESTION PRESENTED.

Respondent Carberry misleadingly argues that this case presents no issue of continuing importance because:

> "[t]he issues presented by petitioner are unique to the temporary arrangement established by the 1989 consent decree between the IBT and the United States. Under the terms of the decree, the authority of the Independent Administrator and the Investigations Officer expired in 1992." (Resp. 11).[1]

It is true that the authority of the Independent Administrator and the Investigations Officer have expired but the questions presented are far broader than the procedures followed by those officials. The important and continuing issues here are as to what constitutes a sufficiently specific charge and a full and fair hearing necessary to comply with the mandate of the LMRDA **which will govern union disciplinary hearings so long as that statute remains extant.**

We also point out that the disciplinary authority under the Consent Decree is now vested in a three member Internal Review Board (IRB) which "may be considered a successor to the Investigations Officer and the Independent Administrator." *United States v. IBT,* 803

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[1] References to the Respondent's Brief are "(Resp . . .)." References to the Petition for Certiorari are "(Pet . . .)"; to the appendix to the Petition are "(Pet. App . . .)" and to the Appendix in the Court of Appeals are "(C.A. App . . .)."

F.Supp. 761, 769 (S.D.N.Y. 1992), aff'd in relevant part, 998 F.2d 1102 (2d Cir. 1993). When the authority of the Investigations Officer and Independent Administrator ceased, their functions were taken over by the IRB. Section G of the Consent Decree (C.A. App. 19-22) sets out the structure of the IRB and the scope of its authority. Judge Frederick B. Lacey, the former Independent Administrator, is a member of the Board. The Board has the same broad investigative authority as that previously held by the Investigations Officer and Respondent Carberry, the former Investigations Officer, is the Chief Investigator of the Board. The procedures followed by the IRB vary only in one respect. Under the prior procedure the Investigations Officer would investigate and initiate disciplinary charges which then would be heard by the Independent Administrator (C.A. App. 8-9). Under present disciplinary procedures upon completion of an investigation the IRB issues a written investigative report detailing the findings, charges and recommendations which are referred to an appropriate IBT entity. The IBT entity must make written findings setting forth the action taken and the reason for that action. If the IRB concludes that the IBT entity has not taken satisfactory action a hearing is then held before the IRB.

The problems as to lack of specificity remain. The IRB continues to make the same type of non-specific charges as employed in the instant case. In *U.S. v. IBT*, 853 F.Supp. 757 (S.D.N.Y. 1994) Judge Edelstein affirmed the decision of the IRB permanently debarring Patrick C. Dellorusso from the IBT. The nonspecific charges were:

Charge One

"While an IBT member, you brought reproach upon the IBT and violated your membership oath in violation of Article II, Section 2(a) and Article XIX, Section 7(b)(1),(2) and (9), to wit:

While a member of IBT Local 295, you were a member of organized crime.

Charge Two

While an IBT member, you brought reproach upon the IBT and violated your membership oath in violation of Article II, Section 2(a) and Article XIX, Section 7(b) (1), (2) and (9), to wit:

While a member of IBT Local 295, you knowingly associated with members of La Cosa Nostra, including but not limited to, Alphonse D'Arco and Louis Daidone."

The scope of the questions presented extends even beyond the construction of the due process protections of the LMRDA and is pertinent to all disciplinary actions by administrative tribunals. *Brock v. Roadway Express, Inc.*, 481 U.S. 252 (1987) dealt with the procedures followed under Section 405 of the Surface Transportation Assistance Act of 1982 (49 USC Appendix § 2305) which protects employees in the motor transportation industry from retaliatory discharge. The court by a six Justice majority held that the Secretary of Labor's failure to inform the employer of the names of witnesses and the substance of the evidence of the employee's complaint before ordering the discharged employee's temporary reinstatement violated due process. The trucking company was afforded an opportunity to meet with the investigator and submit a written statement detailing the basis

for the driver's discharge but it was not provided with the names of the other witnesses or the substance of their statements (481 U.S. at 256). The procedure established by the Secretary of Labor did not require the Secretary to divulge the names of the witnesses from whom the investigator has obtained statements supporting the employee's complaint or the substance of their statements before preliminary reinstatement (481 U.S. at 260). Writing for a four Judge plurality Justice Marshall said:

> "Notice of an employee's complaint of retaliatory discharge and of the relevant supporting evidence would be of little use if an avenue were not available through which the employer could effectively articulate its response." (481 U.S. at 265).

Justices Brennan and Stevens would have gone further than the Court plurality, who required only that the witnesses be identified so that the employer could prepare a meaningful response. Both Justices would require that where there are disputed factual questions critical to the issue, the employer should be given an opportunity to cross-examine the unidentified witnesses who oppose its version of the facts (481 U.S. at 269-70; 275-78).

Although here it is the right of the employee, not the employer, to a fair hearing, his rights to "effectively articulate" his response is no less than that of the employer, if not more so.

II

RELEVANT LANGUAGE OF UNION CONSTITUTION IS VAGUE.

Petitioner contends that, as applied to his case, the union constitution and the Consent Decree are impermissibly vague and overbroad in the relevant provisions prohibiting bringing "reproach" upon the union by "knowingly associating" with members of organized crime, and thus failed to give him adequate notice of the prohibited conduct. Respondent strangely argues that the inadequacies were cured by the finding of the Court of Appeals that "IBT members were aware that association with organized crime figures was prohibited even before the Consent Decree added the provision to the union constitution and that "[t]he new provision simply made explicit the long standing goal of the IBT to be free of corruption" (Pet. App. A15).

But this finding of the court of Appeals does not clarify the vague terms. Granted that union members were aware that "association with organized crime figures was prohibited and that the goal was for the IBT "to be free of corruption" this finding merely restates the vague provisions of the constitution and the Consent Decree. The question still remains. Was the language such as to put a reasonable person on notice that unpublicized, legitimate professional or innocent familial association unrelated to Union affairs and involving no misconduct would be prohibited and the basis for disciplinary action?

Respondent argues that Petitioner's vagueness claim "depends on acceptance of his specific version of the facts, which has been considered and rejected by the

Court of Appeals" (Resp. 9). But Petitioner does not rely on "his version" but on the fact findings of the Court of Appeals (See Pet. 8-9). It is Respondent's version of the facts which goes beyond the Court's findings.

Respondent states that "The record evidence, moreover, is replete with indications that petitioner knew or should have known that his conduct brought reproach upon the union." (Resp. 10). He supports this statement with references to the appellate appendix (Resp. n.4) which we now cover, seriatim.

(1) "Petitioner took pains to conceal his connection with LCN figures. (C.A. App. 408-10)." The reference is to a 1976 FBI report, which was two years prior to Petitioner's joining the union in late 1978.

(2) "Petitioner denied meeting with an IBT organizer and C. Moretina at his residence though physical surveillance places him there." (C.A. App. 229, 422). The sole evidence was (C.A. App. 422) that his car was parked outside Moretina's house.

(3) "Newspaper accounts indicating that Petitioner's relationship to organized crime brought reproach upon the IBT." (C.A. App. 314-315). The 1981 news item simply recounts that Petitioner was hired as an accountant (in fact bookkeeper) for the local and had previously pled guilty to operating a gambling business in 1977 prior to his becoming a union member and unrelated to union affairs. The second news item merely reports Petitioner's termination in a change of union leadership in 1985. These are the only news items as to Petitioner in the 14 years of his union membership.

(4) Respondent then argues that after Peter Simone was identified in a 1991 news story as an LCN member "that's when I felt that . . . I'm possibly putting my job at risk . . . " (C.A. App. 234). Even then petitioner did not end his relationship with Simone. (C.A. App. 277-78, 377).

But Petitioner did resign as accountant for "Be Amused" in November 1991, six months before the charges were brought against him.

The above items are hardly proof of a record "replete with indications that Petitioner knew or should have known that his conduct brought reproach upon the union."

Respondent does not challenge Petitioner's statement (Pet. 24) that:

> "There was no evidence that any of the associations of Petitioner with alleged LCN members was for an improper purpose or that he was guilty of any misconduct during the fourteen years of his union membership or that the criminality of these persons he was found to have associated had any relation to corruption of the union."

III

RELIANCE ON UNCORROBORATED STATEMENT OF A CONFIDENTIAL INFORMANT DENIED A FAIR HEARING.

To argue that Petitioner's associations were not only "innocent familial or professional associations" the Respondent cites the statement in the Court of Appeals' decision that:

> "The Above is sufficient to demonstrate that DiGirlamo engaged in prohibited association, **even if the association was not for an improper purpose. Without relying on other evidence for our decision**, however, it should be noted, for purposes of portraying a complete picture, that some evidence further **suggested** that DiGirlamo not only associated with organized crime figures, but that he may also have served as an instrument of LCN influence on Local 41. (Emphasis ours)
>
> * * *
>
> In 1990, a confidential FBI informant stated that LCN used DiGirlamo to keep apprised of Local 41's financial status so that Johnson could not cite lack of funds as grounds for refusing to follow LCN orders (Pet. App. 13)."

As it indicated, the Court of Appeals did not rely on this evidence for its decision, and we believe it would have been improper to do so. It was the unreliable hearsay statement of an FBI agent as to the oral statement of a "confidential informant." The Agent admitted that it was not corroborated by any other evidence (Pet. A 77). It was denied by the union president and Petitioner and was not even referred to by the Administrator or the District Court in their decisions.

The agent testified that the statement was not a statement of a fact by the informant but his conclusion; that the financial statements are public to the union members and that the monthly reports of the treasurer to the union meeting would contain the information (Pet. A. 77-78). Other than the second-hand hearsay there was no evidence that Petitioner ever gave any financial information

to an LCN figure or was an "instrument of LCN influence" on the union.

Brock v. Roadway Express, Inc., 481 U.S. 252 (1987), supra, as to the right to be provided names of witnesses, supports Petitioner's position that use of the uncorroborated and unreliable double hearsay statement of a "confidential informant" is a denial of a fair hearing. The statement of the informant not only was a conclusion but gave Petitioner no basis for evidence to contradict it. It did not give any facts as to times, places, persons to whom such information may have been given, or what information was given. By not being given the name of the witness Petitioner was denied the right to cross-examine him. The cross-examination of the FBI agent did not solve this problem. He knew nothing other than the oral statement of the informant, which he merely repeated.

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